Multi-Purpose Holdings Bhd & Anor v General Holdings Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-724 OF 2000

LAMIN PCA, ABDUL HAMID MOHAMAD AND ABDUL KADIR SULAIMAN JJCA

16 AUGUST 2002

Trusts and Trustees *— Charitable trust — Completely or incompletely constituted trust — Supplementary agreement created trust for benefit of third party — Parties to agreement failed to carry out terms of agreement — Whether agreement binding on parties — Whether completely or incompletely constituted trust*

By a written agreement ('the principal agreement') entered into between the respondent and the first appellant, the respondent agreed to sell and the first appellant agreed to buy all the issued share capital in the two companies of which the respondent had beneficial interests. The first appellant had paid a substantial portion of total purchase price leaving a balance of RM10m unpaid and remained in the hand of the first appellant. The reason for that was because the respondent through its representative, the late Mr Chang Ming Thien, proposed to set up a charitable foundation to the extent of the amount short paid to be called 'Chang Ming Thien Foundation' ('the Foundation') on terms as set out in an undertaking ('the supplementary agreement') of the same date, entered into between the respondent and the first appellant, 'in consideration of' the principal agreement. Before the incorporation of the Foundation by the first appellant, Mr Chang Ming Thien died. All those while, the respondent did not take any step to incorporate the Foundation. If was the first appellant which took the necessary steps to incorporate the same, which object was clearly charitable. The respondent made a demand for the return of the said sum of RM10m. The respondent caused a writ of summons to be formally issued against the first appellant praying for, inter alia, declarations: (i) that the first appellant held the said sum of RM10m and the interest sum derived from it, as a trustee for the respondent; and (ii) that the gift of the said sum had failed for uncertainty as to the purpose. The trial judge decided in favor of the respondent. Being aggrieved with the said decision, the appellant appealed to us.

Held, allowing the appeal:

(1) Both parties agreed that the first appellant was to hold back the aforesaid RM10m for the purpose of the Foundation to be set up and which is to be put under the management and control of someone to be decided by the nominees of the first appellant. Being a party to such an agreement, it cannot be said that the

first appellant was a volunteer. The promise made by the respondent constituted a trust which is enforceable. An obligation was suffered by the first appellant in having to hold the said sum for the purpose and ran the risk of being sued for the short paid amount agreed under the principal agreement if the purpose was aborted. This in law was a valuable consideration provided by the first appellant to the respondent. It does not matter whether the trust is completely constituted or not as equity regards that as done which ought to be done and will perfect an imperfect conveyance for value by regarding that as a contract to convey (see p 259C–E).

(2) The first appellant was absolved of the liability to pay for the full amount stated as the consideration mentioned in the principal agreement to the extent of RM10m if that amount is utilized for the purpose of the Foundation. Hence, the first appellant could not be said to have been in breach of the terms of the principal agreement for not paying the full consideration mentioned therein (see p 259E–F).

(3) The respondent had fully vested the property in the sum of money for the purpose of the Foundation to the first appellant. The terms as contained in the supplementary agreement constitute a valid declaration of trust in that a general declaration that a gift is for charitable purpose is valid notwithstanding that no particular or specific charity has been mentioned (see p 261B–C).

[Bahasa Malaysia summary

Melalui satu perjanjian bertulis ('perjanjian utama') yang telah dimasuki antara responden dan perayu pertama, responden bersetuju untuk menjual dan perayu pertama bersetuju untuk membeli kesemua modal saham yang dikeluarkan di dalam dua syarikat yang mana responden mempunyai kepentingan-kepentingan benefisial. Perayu pertama telah membayar sebahagian besar daripada jumlah harga belian dengan meninggalkan baki sebanyak RM10j yang tidak berbayar dan kekal berada pada perayu pertama. Alasan baginya adalah kerana responden melalui wakilnya, mendiang En Chang Ming Thien, bercadang untuk menubuhkan sebuah yayasan kebajikan dengan menggunakan jumlah yang kurang dibayar itu yang akan diberi nama 'Yayasan Chang Ming Thien' ('Yayasan tersebut') atas terma-terma seperti mana yang dibentangkan di dalam satu akujanji ('perjanjian tambahan tersebut') yang mempunyai tarikh yang sama, yang telah dimasuki antara responden dan perayu pertama, 'sebagai balasan bagi' perjanjian utama tersebut. Sebelum penubuhan Yayasan tersebut oleh perayu pertama, En Chang Ming Thien telah meninggal dunia. Sepanjang tempoh yang berlalu tersebut, responden tidak mengambil sebarang langkah untuk menubuhkan Yayasan tersebut. Ianya merupakan perayu pertama

yang telah mengambil langkah-langkah yang diperlukan untuk menubuhkannya, yang mana jelas bertujuan kebajikan. Responden telah membuat tuntutan untuk pengembalian jumlah tersebut sebanyak RM10j. Responden telah menyebabkan supaya satu writ saman dikeluarkan secara rasmi terhadap perayu pertama yang memohon untuk mendapatkan, antara lainnya, pengisytiharan-pengisytiharan: (i) bahawa perayu pertama telah memegang jumlah tersebut sebanyak RM10j dan jumlah faedah yang diperolehi daripadanya, sebagai pemegang amanah untuk responden; dan (ii) bahawa pemberian jumlah tersebut telah gagal kerana ketidakpastian berhubung dengan tujuannya. Hakim perbicaraan telah membuat keputusan yang memihak kepada responden. Kerana terkilan dengan keputusan tersebut, perayu telah merayu kepada kami.

Diputuskan, membenarkan rayuan tersebut:

(1) Kedua-dua pihak bersetuju bahawa perayu pertama haruslah memegang RM10j yang tersebut di atas bagi tujuan Yayasan tersebut yang akan ditubuhkan dan yang mana haruslah diletakkan di bawah pengurusan dan kawalan seseorang yang harus ditentukan oleh nomini-nomini perayu pertama. Sebagai satu pihak kepada perjanjian yang sedemikian, ianya tidak boleh dikatakan bahawa perayu pertama merupakan sukarelawan. Janji yang dibuat oleh responden membentuk amanah yang boleh dikuatkuasakan. Satu kewajipan dialami oleh perayu pertama kerana terpaksa memegang jumlah tersebut bagi tujuan itu dan mempunyai risiko didakwa bagi jumlah yang kurang dibayar yang disetujui di bawah perjanjian utama tersebut jika tujuan itu dibatalkan. Ini menurut undang-undang adalah satu balasan yang bernilai yang telah diberikan oleh perayu pertama kepada responden. Ianya tidak menjadi hal sama ada amanah itu terbentuk dengan sempurnanya ataupun tidak kerana ekuiti menganggapkannya sebagai telah dilakukan yang mana seharusnya dilakukan dan akan menjadikan sempurna satu pemindahan hak bernilai yang tidak sempurna dengan menganggapkannya sebagai satu kontrak untuk pindah hak (lihat ms 259C–E).

(2) Perayu pertama telah dilepaskan dari tanggungan untuk membayar bagi jumlah penuh yang dinyatakan sebagai balasan yang disebut di dalam perjanjian utama sehingga kepada had sebanyak RM10j jika jumlah itu digunakan bagi tujuan Yayasan tersebut. Oleh itu, perayu pertama tidak boleh diperkatakan sebagai telah mengingkari terma-terma perjanjian utama tersebut kerana tidak membayar jumlah balasan sepenuhnya yang disebut di dalamnya (lihat ms 259E–F).

(3) Responden telah meletakkan sepenuhnya hartanah tersebut dalam bentuk jumlah wang bagi tujuan Yayasan tersebut kepada

perayu pertama. Terma-terma seperti mana yang terkandung di dalam perjanjian tambahan membentuk satu pengisytiharan amanah yang sah iaitu sesuatu pengisytiharan umum bahawa sesuatu pemberian adalah untuk tujuan kebajikan adalah sah meskipun bahawa tiada kebajikan yang khusus atau tertentu yang telah disebut (lihat ms 261B–C).]

Notes

For the cases on completely or incompletely constituted trust, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) para 1737.

Cases referred to

Alghussein Establishment v Eton College [1988] 1 WLR 587 (refd)
Lee Eng Teh & Ors v Teh Thiang Seong & Anor [1967] 1 MLJ 42 (refd)
Milroy v Lord (1862) 4 De GF & J 264; 31 LJ Ch 798 (refd)
Pegang Mining Co Ltd v Choong Sam & Ors [1969] 2 MLJ 52 (refd)
Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd [1999] 3 MLJ 489 (refd)
Tohtonku Sdn Bhd v Superace (M) Sdn Bhd [1992] 2 MLJ 63 (refd)

Legislation referred to

Trustees (Incorporation) Act 1952 s 2

Cecil Abraham (*Robert Lazar* with him) (*Shearn Delamore & Co*) for the first appellant.

Wong Chong Wah (*Lim Hoon Huan* with him) (*Skrine*) for the intervenor/second appellant.

LH Chua (*LH Chua*) for the respondent.

Abdul Kadir Sulaiman JCA (delivering judgment of the court): This is an appeal against the decision of the learned judge of the Kuala Lumpur High Court given on 30 September 2000 allowing the respondent's claim against the first appellant which decision indirectly affects the interest of the second appellant. However, the second appellant was not made party in the action before the learned judge.

The facts are simple. By a written agreement dated 27 November 1980 entered into between the respondent and the first appellant ('the principal agreement'), the respondent agreed to sell and the first appellant agreed to buy all the issued share capital in the two companies of which the respondent had beneficial interests. The total purchase price was stated to be RM206,252,345. The first appellant paid RM196,252,345 towards the total purchase price leaving a balance of RM10m unpaid and remained in the hand of the first appellant. The reason for that was because the respondent through its representative, the late Mr Chang Ming Thien,

proposed to set up a charitable foundation to the extent of the amount short paid to be called 'Chang Ming Thien Foundation' ('the Foundation') on terms as set out in an undertaking ('the supplementary agreement') of the same date, entered into between the respondent and the first appellant, 'in consideration of' the principal agreement mentioned earlier. The supplementary agreement recited that 'the management and control' of which, ie the Foundation, was to be decided by the nominees of the first appellant. Thus the sum of RM10m remaining in the hand of the first appellant for the said purpose. The Foundation was only incorporated on 18 April 1990 as a company limited by guarantee, at the instance of the first appellant.

In the meantime, on 27 March 1982, ie before the incorporation of the Foundation by the first appellant, Mr Chang Ming Thien died. All those while, the respondent did not take any step to incorporate the Foundation. If was the first appellant which took the necessary steps to incorporate the same, which object was clearly charitable. Steps were then taken by the first appellant to appoint its nominees to manage and control the activities of the Foundation in accordance with the terms of the supplementary agreement. While in the hand of the first appellant, the said sum of RM10m was duly invested which earns interest.

Somehow, by a letter dated 6 September 1990, by which time the Foundation was already in existence under the management and control of the nominees of the first appellant, the respondent made a demand for the return of the said sum of RM10m. On 28 September 1990, the first appellant transferred the income derived from the RM10m investment, amounting to RM4,375,000 to the account of the Foundation, and still holding on to the principal sum. Then on 27 May 1991, the first appellant informed the respondent that it was ready to pay the principal sum of RM10m to the Foundation. But by a letter dated 12 June 1991, the respondent's solicitors wrote as follows to the first appellant:

> I refer to your letter dated 27 May 1991 which was only received in my office on 1 June 1991.
>
> In this connection, I write to place it on record and to bring it to your attention that you hold the monies upon trust and to which my clients are legally entitled.
>
> My clients have instructed me to institute appropriate proceedings and the necessary papers are being prepared for filing.
>
> *In the interim period, you are advised not to part with the monies held by you.* And in the event that you do, you will no doubt continue to be responsible for the payment of the same to our clients in due course.
>
> Finally, it may be pertinent for me to point out as a caution to you that *paying out the money to anyone else would constitute criminal breach of trust* and there being attendant consequences. (Emphasis added.)

True to the aforesaid notice of demand, on 18 December 1991, the respondent caused a writ of summons to be formally issued against the first appellant praying for declarations:

(a) that the first appellant held the said sum of RM10m and the interest sum derived from it, as a trustee for the respondent;

(b) that the gift of the said sum had failed for uncertainty as to the purpose;

(c) that if the gift was for charity, it fails for uncertainty;

(d) in the alternative, that the respondent was entitled to manage and control the trust fund of RM10m for the purpose of charity or any charitable institution to be approved by the relevant authority.

By a re-amended defence, the first appellant, inter alia, averred that by the terms of the supplementary agreement, it was discharged from having to pay the said sum towards the full payment of the purchase price for the sale of the shares to it by the respondent pursuant to the principal agreement. In the alternative, the first appellant averred that, if liable, the action by the respondent was statute barred or barred by laches or acquiescence on the part of the respondent. The first appellant further averred that it intends and will abide by the decision of the court, to pay the said sum of RM10m to the Foundation in compliance with the wishes of the respondent and the late Mr Chang Ming Thien and in conformity with such intention, the first appellant had paid out the amount of interests accrued to the Foundation.

The action went for trial before the learned judge where various witnesses gave evidence. At the end of it, the judge decided in favor of the respondent. By the order of 30 September 2000, it was adjudged and declared that the respondent is entitled to have the management and control of the trust fund of RM10m for the purpose of charity or any charitable institution to be approved by the relevant authority and the first appellant was ordered to pay costs of the action to the respondent.

In his grounds of decision, the learned judge observed that the relief sought by the respondent under prayer (d) above, has the effect of varying or amending the terms of the aforesaid supplementary agreement. Hence, the central issue for his determination was whether the respondent was entitled to vary or amend the terms of the aforesaid supplementary agreement. Having dealt with the law on the matter of charitable trust, in his finding, the learned judge observed that the respondent did nothing to cause the said sum of RM10m to be deposited with the Foundation. On the principle in *Milroy v Lord* (1862) 4 De GF & J 264; 31 LJ Ch 798, he held that the supplementary agreement was not binding on the respondent. Consequently, there was nothing to prevent the respondent from varying or amending the terms of the aforesaid supplementary agreement. Holding that the first appellant being a volunteer, it had no right whatsoever to enforce the supplementary agreement. So, he made the order in terms of prayer (d) of the statement of claim of the respondent.

Being aggrieved with the said decision, the appellant appealed to us. It is to be emphasized that by the suit of the respondent in the High Court, the second appellant was not made party to it even though the income from

the RM10m was by the material date of the suit was already credited to its account by the first appellant. That notwithstanding, following the judgment by the learned judge, the solicitors for the respondent by a letter dated 28 November 2000 addressed to the solicitors for the second appellant made a demand on behalf of the respondent upon the second appellant to forthwith cease to have management and control of the trust fund and to procure and secure the resignation of all trustees and other office bearers of the Foundation as the respondent would be writing to the Minister pursuant to s 2 of the Trustees (Incorporation) Act 1952 to register the charitable foundation with the proposed trustees appointed by the respondent.

Faced with the situation, the second appellant on 6 February 2001 filed a notice of motion in the Court of Appeal for leave to intervene in the appeal and to be added as a party and for leave to file grounds of appeal/claim in the proceedings.

On the day of the hearing of the appeal which was on 14 February 2001, the said application of the second appellant came up before us for disposal. The court comprised of the chairman, Lamin PCA, Abdul Hamid Mohamad and Abdul Kadir bin Sulaiman JJCA as members (the chairman has since retired). Having heard the arguments by the parties, we unanimously allowed the motion. Hence, the position of the second appellant in this appeal.

We allowed the application of the second appellant on the ground that we found the second appellant indeed had a legal interest in the appeal in the light of the letter on behalf of the respondent to it of 28 November 2000 mentioned earlier requiring the second appellant to forthwith cease to have management and control of the trust fund and to procure and secure the resignation of all trustees and other office bearers of the Foundation as the respondent would be writing to the Minister pursuant to s 2 of the Trustees (Incorporation) Act 1952 to register the charitable foundation with the proposed trustees appointed by the respondent. In the circumstances the second appellant ought to be given leave to intervene in this appeal (see *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52 followed in *Tohtonku Sdn Bhd v Superace (M) Sdn Bhd* [1992] 2 MLJ 63).

Having disposed of the matter in the motion, the same panel of the court proceeded to hear the appeal of the appellants. At the end of it, we again unanimously allowed the appeal by both appellants, wherein the order of the learned judge was set aside and the claim of the respondent was accordingly dismissed with costs here and below awarded to the first appellant. The second appellant was awarded costs in this appeal only. We also ordered that the deposits to be refunded to the appellants. We now provide our reasons for the decision.

In his judgment, the learned judge held the first appellant to be a volunteer without valuable consideration given as regards the supplementary agreement because the respondent did nothing to cause RM10m to be deposited with the Foundation. He went on to observe that

by such omission on the part of the respondent, it could not be said that the respondent had done everything pursuant to the supplementary agreement to vest the property in the Foundation. For the reason, the first appellant had no right whatsoever to enforce the said supplementary agreement. Consequently, there is nothing to prevent the respondent from varying or amending the terms of the supplementary agreement. He held so on the purported principle as enunciated in *Milroy v Lord* which was followed in *Lee Eng Teh & Ors v Teh Thiang Seong & Ors* [1967] 1 MLJ 42. We are of the view that the learned judge had misdirected himself in this respect.

Firstly, on the terms of the principal and the supplementary agreements, the first appellant cannot be a volunteer. Both parties agreed that the first appellant was to hold back the aforesaid RM10m for the purpose of the Foundation to be set up and which is to be put under the management and control of someone to be decided by the nominees of the first appellant. Being a party to such an agreement, it cannot be said that the first appellant was a volunteer. The promise made by the respondent constituted a trust which is enforceable. An obligation is suffered by the first appellant in having to hold the said sum for the purpose and ran the risk of being sued for the short paid amount agreed under the principal agreement if the purpose is aborted. This in law is a valuable consideration provided by the first appellant to the respondent. If this is so, it does not matter whether the trust is completely constituted or not as equity regards that as done which ought to be done and will perfect an imperfect conveyance for value by regarding that as a contract to convey. By the terms of the supplementary agreement, no time frame was set as to when the said Foundation was to be set up. Secondly, by the terms of the agreement reached between them, the first appellant was absolved of the liability to pay for the full amount stated as the consideration mentioned in the principal agreement to the extent of RM10m if that amount is utilized for the purpose of the Foundation. Hence, the first appellant cannot be said to have been in breach of the terms of the principal agreement for not paying the full consideration mentioned therein. Further, the supplementary agreement itself, executed by Mr Chang Ming Thien on behalf of the respondent, states that it was an undertaking given 'in consideration of' the principal agreement. So, there is a lawful consideration provided which would not constitute the first appellant a mere volunteer in the transaction with the respondent. In the judgment, the learned judge quoted a passage from the decision of Turner LJ in *Milroy* appearing at p 798 of the report as follows:

> In order to render a voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provisions will then be effectual; and will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes....

> But, in order to render the settlement binding, one or other of these modes must (as I understood the law of this court) be resorted to, for there is no equity in this court to perfect an imperfect gift.

On the facts, based on the principal agreement, the first appellant was initially obliged to pay this RM10m to the respondent to make up the full purchase price of the shares based on the principal agreement. But upon the existence of the supplementary agreement, the first appellant need not do so because that amount was required for the purpose of the Foundation to be put under the management and control of someone to be decided by the nominees of the first appellant. It is common ground that the said sum was withheld by the first appellant on account of what was stated in the supplementary agreement, the terms of which form the core of the contention in this case. This arrangement, in our view, satisfies the requirement in the decision of Turner LJ mentioned earlier to render even a voluntary settlement valid and effectual. But in this present matter as mentioned earlier, we do not consider it as a voluntary settlement which makes the situation even worst to hold the settlement invalid and ineffectual. At the least, the said property, upon true construction of the terms of the supplementary agreement, had been vested in the first appellant as trustees for the benefit of the beneficiaries. The beneficiaries here must be none other that the Foundation intended to be established. The respondent was bound by the terms. The failure to set up the Foundation was the respondent's own and therefore it cannot rely on its own default to do so (see *Alghussein Establishment v Eton College* [1988] 1 WLR 587 and *Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd* [1999] 3 MLJ 489). In the circumstances, it is not correct to hold, as the learned judge did, that the supplementary agreement is not binding on the respondent so as to enable the respondent to vary or amend the terms of such agreement. The learned judge was well informed of the judgment of Gill J (as he then was) in *Lee Eng Teh & Ors v Teh Thiang Seong & Anor* as he in the present judgment has cited a passage of the judgment of Gill J at p 44 as follows:

> The next question to be considered is whether the promise made by the first defendant constituted a trust which is enforceable. Whether a trust is enforceable or not depends upon whether it is completely or an incompletely constituted trust. A trust is said to be completely constituted when the trust property has been vested in trustees for the benefit of the beneficiaries: until that has been done the trust is incompletely constituted. The distinction between completely and incompletely constituted trusts is of importance principally with regard to the question of consideration. In other words, the question to be considered is whether valuable consideration was given for the creation of the trust. If valuable consideration is given in exchange for the creation of the trust, it does not matter whether the trust is completely constituted or not, for equity regards as done that which ought to be done and which perfect an imperfect conveyance for value by treating it as a contract to convey. But there is no equity to perfect an imperfect trust. As was said by Lord Eldon in *Ellison v Ellison* (1802) 6 Ves 656, 662; 6 RR 19:
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> > 'I take the distinction to be, that if you want the assistance of the court to constitute a cestui que trust, that the instrument is voluntary, you shall

A not have that assistance, for the purpose of constituting a cestui que trust, as upon a covenant to transfer stock, it rests in covenant, and is purely voluntary, this court will not execute that voluntary covenant, but if the party has completely transferred stock, though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this court.'

B So, our view is that, on the facts, the respondent had fully vested the property in the sum of money for the purpose of the Foundation to the first appellant. The terms as contained in the supplementary agreement constitute a valid declaration of trust in that a general declaration that a gift is for charitable purpose is valid notwithstanding that no particular or C specific charity has been mentioned. The learned author of *Snell's Equity* (29th Ed) has this to say at p 143:

> Unlike private trusts, they cannot fail for uncertainty of objects. So long as the trust instrument shows a clear intention to devote the property to charity, it is immaterial that the particular mode in which the intention is to be carried out into effect is left uncertain.

D Still on the point, *Halsbury's Laws of England* Vol 5(2) at p 105 states:

> Where a clear charitable intention is expressed, a gift which is otherwise valid is never allowed to fail on account of the uncertainty of the object, but the particular mode of application will be directed by the Crown in some cases, E and by the court in others.

Pending the setting up of the said Foundation, the first appellant had held the property in trust for the beneficiary, which in this case, cannot be the respondent but the Foundation. Late though it may be, subsequently, the Foundation, for which purpose the property was vested, was incorporated F at the instant of the first appellant as a company limited by guarantee on 18 April 1990. The first appellant did not misappropriate the property. Instead it was bearing income in the form of interest, which interest sum was subsequently credited to the account of the Foundation. As to the principal sum continued to be held by the first appellant, it is not in dispute that it is still in the management and control of the first appellant for the G reason that firstly, no foundation was incorporated and secondly, the letter on behalf of the respondent mentioned earlier of 12 June 1991 directed the first appellant not to part with it or to pay it out to any one lest the first appellant be committing a criminal breach of trust.

In the way the event turns leading to the filing of the suit by the H respondent against it, it is expected of the first appellant to aver in its re-amended defence that in the event the court was to hold the Foundation is the proper beneficiary, it will pay the said principal sum to the Foundation. As for the second appellants, in the light of the letter on behalf of the respondent of 28 November 2000 mentioned earlier addressed to the solicitors for the second appellant to forthwith cease to have management I and control of the trust fund and to procure and secure the resignation of all trustees and other office bearers of the Foundation, had made the second appellant an interested party in this appeal.

For the above reasons, we allowed the appeal of the two appellants on terms mentioned earlier having satisfied that the gift was a valid one and on the terms of the supplementary agreement, the management and control of the Foundation which is charitable, shall be decided by the nominees of the first appellant which accordingly had been done.

Appeal allowed.

Reported by Peter Ling